No. 476

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

BRYANT McQUILLEN ET AL,
Petitioners,

AGAINST

THE NATIONAL CASH REGISTER CO. ET ALS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT OF SAME.

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TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Applicants (plaintiffs) respectfully present this application for a writ of certiorari to the C.C.A. (4) to review its final judgment entered June 11, 40, affirming final decrees entered by Coleman, J. in the D. C. of Md. (Md. Ct.), Jan. 11 39 and July 13, 39, dismissing amended bill of complaint drawn and filed by defendants (not plaintiffs) on June 30, 38, pursuant to and as limited by his orders entered respectively Jan. 7, July 1, 36; June 16, 37; June 30, 38. (Appellants' appendix (Apx. 57)). Appeal embraced all previous adverse interlocutory orders, decrees and decisions, entered by Md. Ct.

OPINIONS BELOW.

1st opinion of Md. Ct. 13 F.S. 53 was filed Dec. 14, 35 (about 11 months after hearing). 2nd opinion, Md. Ct. (oral) given July 14, 36, appears apx. p. 75. 3rd opinion, Md. Ct. 22 F.S. 867 was filed Mar. 17, 38, apx. p. 80, Md. ct's order Nov. 10, 38, apx. p. 98. Opinion C.C.A. (4) filed June 10, 30, is in 112 F (2) 877.

JURISDICTION.

C. C. A. judgement was entered June 11, 40. This court extended time for filing this application to and including Sept. 30, 40. Jurisdiction is founded on J. C. s. 240 (a), amended Feb. 13, 25 (28 U.S.C. s. 347, 350).

STATUTES AND RULES INVOLVED.

J.C. s. 57, 28 U.S.C. s. 118; Eq. R. 27, 38; Md. Corp. Laws, Art. 23, sections 23, 28, 29, 30, 31, 32 (1-7, incl.)

STATEMENT.

1st bill was filled July 5, 34, and amended bill Feb. 4, 35. Plaintiffs sued in good faith as minority stockholders for benefit of National Cash Register Company (NCR) a Md. corporation, organized Jan. 26 and in behalf of all A shareholders. They acquired their 100 A preferred shares June 20, 28 for $8,000. Their present value is $1,600. In 29 the total market value of all outstanding 1,190,000 A shares was $175,000,000. In 32 it was about $10,000,000. There is no issue in respect to demand under Eq. R. 27. Jurisdiction was founded on J.C. s. 57. In 26 NCR acquired all assets of its predecessor of same name, an Ohio corporation, which was dominated and controlled by defendants, F. B. Patterson, Barringer, Steffey, Allyn, Kuhns (referred to as managers of Ohio corporation and NCR). It had outstanding 96,710 7% cumulative $100 preferred and 90,000 $100 common shares. All individual defendants were non-residents of Md. Managers and Dillon Read Co. (DR) organized NCR which they dominated, with unissued capital of 1,100,000 (increased in 29 to 1,190,000) no par A with preferential cumulative dividends of $3 and 400,000 B shares entitled to $3 non-cumulative dividends, both classes sharing further dividends as shares of one class. Upon dissolution or distribution A and B shared assets as holders of

one class. B, until default of 2 quarterly A dividends elected majority of directors. After default both classes as one class, elected directors. When accumulations were paid and NCR earned equivalent of one year's A dividends, B could resume control. F. B. Patterson was president and director continuously after organization of NCR, Barringer was V. P. and director until 31, Steffey was director and sales manager until 31, Haswell, Hartman, Allyn and Kuhns were directors continuously after organization. R. D. Patterson, relative of F. B., was director continuously after 31. Behr, DR's employee and its representative, served as director continuously after 27. Phillips, DR's partner and its representative, served as director from 31 to 33. Bennett, V.P. or Irving Trust Co., served as director continuously after 26. McCain, pres. of Chase Natl. Bank, served as director continuously after 32. Deeds, close business associate of Rentschler, a director of Natl. City Bank of which Rentschler was president, served as chairman and director of NCR continuously after Apr. 31. Rentschler served as director continuously after 31. (13 F.S. 53) All B shares were issued to, owned or dominated and controlled by managers and DR. They managed and controlled NCR's business continually from its organization, and elected other directors. F. B. Patterson, his family and Farhills Co., a corporation which he owned, held majority of B shares. In Jan. 26, 150,000 B were transferred by managers, James and DR to a bank and later to NCR in trust for benefit of NCR's officers, directors and employees to be awarded them for future services to NCR in addition to salaries. (Apx. 101, 103, 109).

Though bills allege a conspiracy among individual defendants to deplete NCR's assets and to injure A holders by many illegal and fraudulent devices for their substantial benefit and sought relief in rem and in personam for all wrongful acts committed pursuant thereto, plaintiffs also

sought separately, relief for each wrongful act. (112 F (2) @880) (Apx. 1–56)

Pursuant to the conspiracy, they committed, among others, following wrongs: In Dec. 25 managers and DR caused Ohio Co. to retire all its preferred. Simultaneously they secretly obtained options to purchase all its common for $26,000,000. Simultaneously they organized, controlled and became sole officers and directors of NCR. At the same time, they, as NCR's agents and trustees, put out for subscription and sale for NCR's benefit all its 1,100,000 authorized but unissued A, which public bought for $55,000,000 in the belief that their subscriptions were being paid to NCR. After defendants collected this fund, property of NCR, they secretly converted it to their use. With $26,-000,000 of its funds, they wrongfully, in their own names, took up options on Ohio common, pretending they were their property. They then secretly and fraudulently caused Ohio Co.'s assets to be transferred to NCR and simultaneously caused latter fraudulently to issue to managers, DR and James all NCR's A shares which they wrongfully converted and simultaneously caused NCR in lieu or in exchange thereof to issue A shares to subscribers, concealing their wrongful acts and causing subscribers to believe that shares they were receiving were issued to them by NCR. No part of A shares was bought by defendants, or ever paid for with their money. Simultaneously, as they wrongfully planned to do, they converted and divided between them the remaining $29,000,000 which they held as trustees for NCR, of which managers converted $14,000,000, DR and James $15,-000,000 which they hold as trustees for NCR's benefit. They simultaneously and illegally issued to themselves NCR's unissued 400,000 B for which they paid nothing to NCR, which they also secretly divided, Patterson converting majority, Barringer, Allyn, James and Dr the balance. As part of scheme, by contributions made by each conspirator,

they simultaneously conveyed 150,000 of these B shares (out of 400,000 B) first to banks and later to NCR in trust for NCR's unnamed and uncertain officers, directors and employees, for transfer to them from time to time for services to be rendered, in addition to adequate salaries, NCR's officers determining amount they should receive. Though defendants coerced NCR to issue these shares, as aforesaid, for which they should have paid profit income tax of $678,375, they wrongfully and secretly coerced NCR to pay it. Patterson and DR retained the voting rights. Between 26 and 30 defendants coerced NCR to distribute 45,000 B, defendants Kuhns, Steffey and Hartman receiving several thousand in addition to illegal and excessive salaries voted to themselves. NCR has since held remaining 105,000 B and has obtained dividends on them (Apx. p. 296, 297; NCR. v. U.S. 10 F.S. 685,689, which reveals transaction). Up to 31 NCR paid all B holder $6,200,000 dividends of which Patterson received $3,200,000, Barringer and Allyn, each $253,870, other defendant officers or managers participating substantially in addition to excessive salaries (apx. 55), (Apx. 13, 26) (See An. Rep. 30, 31, 34 to 37; 10 F.S. 685). Plaintiffs sought accounting for their conversion of the $29,000,000 to establish it as a trust fund for NCR's benefit, including dividends paid on B, cancellation of illegally issued 400,000 B, including 150,000 B, or alternative relief. (Apx. 1, pars. 12, 13, 14; 13 F. S. 53; Apx. 82)

They alleged as part of conspiracy, that between Jan. 1, 30 and Jan. 1, 33, $7,000,000 A dividends accumulated. B likewise received no dividends. B holders notwithstanding default, as part of conspiracy continued as officers and directors and controlled NCR. During depression, 30 to 36 (see Ann. Reps. apx) NCR suffered substantially decreased earnings and losses. Its substantial uninvested surplus was wiped out and its capital impaired by nearly $5,000,000 in 32. (Ann. Rep. 30-33 incl.) (Apx. p. 128)). Be-

cause of defaults, A holding majority was entitled to elect efficient officers and directors, to oust B from control and thereby prevent the waste, illegal acts, excessive salaries, conversions which had occurred and to obtain relief from managers, DR, Deeds and others for past grievances upon discovery of these wrongs which defendants concealed. Anticipating this, knowing that A dividends must indefinitely accumulate annually by $3,600,000, that NCR's business outlook was dark, that A accumulations could never be paid, that their B shares were valueless, and that they had lost control and the opportunity to obtain the improper advantages they had theretofore obtained, defendants, beginning with 31 and through 32, fraudulently brought about a situation by which they would retain the improper advantages, and deprive A holders of their rights. To accomplish this, they coerced, by illegal and fraudulent means, NCR to exchange all B of which they were the owners or trustees (which they concealed from A holders) for 200,000 illegally created C shares having same rights and preferences as A, coerced NCR to deprive A of their large accumulated and future preferential dividends, misappropriated all its surplus available for A dividends to their own use, deprived A of their contractual, vested, statutory and constitutional rights, coerced NCR to issue and fraudulently coerced numbers of A holders to accept in lieu of such dividends which they were entitled to receive in cash, 238,000 A shares which they illegally coerced NCR to issue, coerced it to divide among B holders under the guise of dividends, property and funds of NCR, contributed wholly by and belonging to A holders, deprived A holders of the control to which they were entitled, wrongfully continued such control in themselves, and together with the other defendants, continued as they had done for many years to misappropriate and waste NCR's assets and property, to the great injury of A holders. By illegal acts, concealments, failure to make ful

disclosures, breaches of fiduciary duty in their own interests, they prevented recovery for the wrongs complained of. (112 F (2) @ 880, apx. 7, 63, 14, 16, 18, 20, 24). They consummated the fraudulent, illegal 32 reorganization, continued payments of illegal and excessive salaries to themselves and as part of scheme coerced NCR to pay to DR and to its partner directors of NCR, a bribe of $65,000 for their work in persuading A holders (to whom they had sold practically all A shares) to adopt the reorganization. (apx. p. 178) (Ann. Rep. 31, 32.)

As part of the 32 reorganization and to enable defendants to improperly pay dividends on their illegally exchanged shares, they wrongfully created a fictitious surplus of more than $7,000,000 out of the capital as it stood before the reorganization by arbitrarily and illegally reducing capital by $17,000,000. (Ann. Rep. 32–37). They illegally filed with the Md. Tax Commissioner unauthorized and false certificates, reducing, not the capital, but reducing the capital stock, see notice (apx. 325) apx. 334, 104)) and illegally procured from the Commissioner authority for such reduction of capital stock and authority to amend NCR's charter for the issuance of the 238,000 A and the 200,000 C. Such amendments wrongfully certified, under oath of Kuhns and Allyn, that 2/3rds of each class of shares had authorized amendments though only 2/3rds of all A and B holders as a single class, including B shares secretly held by managers, assented thereto. (112 F (2) @ 883) (apx. 102, 105, 113, 325, 332, 334, 337, 345; Ann. Rep. 30–37 inc. apx.) As part of same conspiracy, to accomplish such illegal reorganization and to obtain for themselves the illegal and improper advantages thereunder, obtaining for their valueless B, C shares having value of A, managers, with the advice and consent of Rentschler, and with his and other directors' aid, and when NCR was suffering great losses as it did from 30–36 inc., A dividends having accumulated by many mil-

lions, well knowing that the depression had seriously affected NCR's business, they illegally coerced NCR in 31 to retain Deeds as its chairman and director, B holders by their control, electing him a B director, and coerced NCR to illegally employ its assets and capital for Deeds' and their own benefit in the acquisition of 60,000 A at about $8 per share, and illegally and improperly gave Deeds, in addition to his inordinate and never earned salary of $100,000 yearly, a 5 yr. option in Sept. 32 to purchase such A shares at cost to NCR, with interest at 4 per cent after deducting dividends, well knowing that such shares were intrinsically worth greatly in excess thereof, which shares Deeds took up from time to time with funds he illegally received under the guise of salary profiting, in addition to his salary, about $2,000,000, such shares having risen to $38 per share; that he never earned such salary or benefits from the option since during and under his management, NCR suffered great losses, dividends on A accumulated by many millions, since Deeds, in consideration thereof, actively participated and aided in the wrongful 32 reorganization and in the wrongful acts by which it was consummated. Though he agreed to devote all his time to NCR's business, he devoted only 3 or 4 days a week thereto. During such period he secretly received from 2 other corporations of which he was president, General Sugar Co. which was in receivership and in which National City Bank was interested and Niles Bement Co., a salary of $86,000 annually; that the salary which he received from NCR and the terms and reason for the option, the large profits he received thereby and the employment and salary which he received from the other corporations and the wrongful acts committed by him in connection with and growing out of the reorganization, including the reason for his employment, he and the other defendants concealed from shareholders until after the filing of the suit; that important, material facts were

concealed from them for a long time thereafter; that shareholders never gave their consent to the Deeds' transaction, by vote or otherwise, never approved any of the wrongful acts and never gave their approval, as required by Md. law, to the 32 reorganization, defendants improperly concealing their wrongful acts and failing to make full disclosure, as they were required to do. (apx. 113–129; 230; 231; see Cong. Record, Vol. 67, part 1, pp. 887, 893, 894, 900–914; apx. 262, 265, 178, 168, 169, 307; see Ann. Rep. attached to app. 30–37; apx. 113, 119, 120; Ex. A. p. 129, 128, 127, 125, 129).

Plaintiffs sought recovery from defendants of salaries because of their fraud, for breaches of fiduciary duties, for sums paid in excess of fair value of services (apx. p. 55, Ex. A, p. 54) for cancellation of 32 reorganization and action taken thereunder, for cancellation of Deeds' option, for recovery of dividends and payments to Deeds, or alternatively, relief as to matters stated in rem, recovery of the $5,000,000 wasted in Ellis Co. transaction and injunctions to restrain wrongful acts, including payment of dividends, excessive salaries and voting illegally issued shares. (Oral op. and Mar. 17, 38, apx. p. 80; op. May 4, 39, apx. pp. 1–57.)

PROCEEDINGS IN MD. CT. AND C. C. A. (4).

Feb. 35, Md. Ct. heard motion for substituted service which NCR unsuccessfully resisted on jurisdictional grounds. Dec. 14, 35, (13 F.S. 53) it ordered service on those subsequently appearing specially, DR, Patterson and Allyn, refusing it as to other officers and directors, whom applicants urge were necessary if not indispensable parties. Feb. 1, 36, defendants, except DR, Patterson and Steffey, appeared specially and moved to quash service on jurisdictional grounds which court denied June 25, 36. July 1, 36, still appearing specially, defendants moved limiting proceedings to matters in rem and striking matters in personam and alternative relief in rem. By his oral opinion

July 14, 36, relying upon J.C. s. 57, Md. Ct. granted their motion. (apx. 75) striking averments for recovery of $29,000,000 or following this as a trust fund including salaries which defendants voted themselves, sums in excess of fair value of their salaries, dividends illegally paid on all B, recovery for waste of $5,000,000 overpaid in acquisition of Ellis Typewriter Co., all alternative relief in rem, limiting relief strictly to cancellation of illegally issued 238,000 A, 200,000 C. June 25, 37, still appearing specially, defendants moved to dismiss bill or strike transactions relating to illegal issuance of all B and transfer of B to NCR as trustee, alleging these occurred before June 20, 28, when plaintiffs acquired their A shares and that under Eq. r. 27, court could not entertain these grievances. In same motion, they moved to strike averments respecting issuance of 238,000 A, to all A holders in lieu of accumulated and future preferred dividends and all other rights, on the ground of nonjoinder as indispensable parties of all A holders. Court granted their motion, first under Eq. r. 27 and second, because of nonjoinder, holding that neither plaintiffs or NCR represented A or their interests. (apx. 87, 89). By these many motions bill was shorn of its most important grievances and prevented proof of conspiracy, court on Nov. 10, 38 having ruled out inquiry into stricken transactions as proof of conspiracy of those retained. Md. Ct. retained bill as to what remained of 32 reorganization, i.e. cancellation of 200,000 C shares and exchange thereof for 400,000 B, and cancellation of Deeds' option. (apx. 80–98 inc. 22 FS. 867) (apx. 79).

Though Md. Ct. made no order requiring plaintiffs to file new amended bill, June 30, 38 it ordered defendants over plaintiffs' objection, to file amended bill drawn by defendants, limiting averments to these two transactions (apx. 56). Aug. 38 defendants still appearing specially, answered, substantially admitting averments as to these transactions but

denying fraud, conspiracy, illegality, violation of Md. laws or NCR's charter, concealments, failure to disclose, or any unfairness, or inequities Deeds averred under oath that officers and directors, when he was retained in 31, agreed that he should receive additional compensation by way of profit sharing or option to acquire shares if NCR's business proved successful under his management. (Deeds' answer).

Nov. 10, 38 (apx. 79) Md. Ct. ordered on defendants' motion, that depositions be limited strictly to defendants' bill and that without limitation there should be no inquiry into matters stricken by court's order because they were unrelated to matters retained. Jan. 39, Md. Ct. tried suit. May 4, 39 it filed opinion dismissing bill. (apx. 98, 27 F.S. 639). From final decree and all previous adverse orders plaintiffs duly appealed to C.C.A. (4). Apr. 16, 40 appeal was argued. June 10, 40, C.C.A (4) filed its opinion affirming Md. Ct. as to all its orders, decisions and final decree. (112 F (2) 877) Judgment was entered June 11, 40.

Under "QUESTIONS PRESENTED" herein, applicants have partly stated rulings in which both courts erred. Though they held that there was no fraud, conspiracy or illegality, applicants assert that their conclusions were erroneous. They also assert that on courts' findings of facts, excluding or including averments in their bill, truth of which was admitted by their several motions (10 F.S. 75) and on undisputed evidence which they failed to consider, erroneous rulings of law which they made, that both courts erred. Applicants have stated below only grounds for this application.

QUESTIONS PRESENTED.

1. Did C.C.A. err in affirming order permitting defendants to appear specially and in granting their motion striking all matters in personam, all alternative relief in matters in rem on the ground that under J. C. s. 57, Md. Ct. had no jurisdiction to grant such relief? (112 F. (2) 877, par. 3, 4, 5).

2. Did C.C.A. err in affirming ruling permitting defendants to appear specially and in granting their motion to strike averments as to illegal issuance of 400,000 B and 150,000 B (in Jan. 26) because under Eq. R. 27 plaintiffs could not complain of wrongs occurring before they became shareholders (June, 28)? (112 F (2) @ 881, 882, 883, pars. 5, 6, 7–10 inc.).

3. Did C.C.A. err in affirming order granting their same motion striking averments as to issuance of 238,000 A shares to holders of the 1,190,000 A shares on the ground of nonjoinder of latter or their transferees as indispensable parties? (112 F (2) @ 881, pars. 3, 4, 5, p. 882, pars. 6, 7, 9.)

4. Did C. C. A. err in affirming order made Nov. 10, 38 limiting scope of plaintiffs' inquiry strictly to relief sought by (defendants') amended bill and ordering that plaintiffs should not inquire into the 26 transaction, as to the issuance, sale or distribution of the A shares, conversion of proceeds by defendants from such sale or as to illegal issuance to themselves of 400,000 B shares, or into any matters stricken? (112 F (2) @ 882, par. 10; apx. 79).

5. Did C. C. A. err in affirming ruling holding that such part of the 32 reorganization as was retained and all acts taken to consummate the same were legal, proper and in accordance with Md. laws and NCR's charter? (112 F. (2) p. 883).

6. Did C. C. A. err in affirming ruling that the Deeds' option was legal, proper, founded in good consideration and that he was entitled thereto in addition to his salary? (112 F. (2) @ 884, par. 16).

SPECIFICATIONS OF ERRORS TO BE URGED.

1. It is unnecessary to repeat here as errors those set forth in "QUESTIONS PRESENTED", all of which will be urged.

If writ is granted, applicants will urge as further errors the following:

2. All C.C.A. rulings affirming orders and decrees of Md. Ct.

3. Affirming order refusing substituted service on defendants, Phillips, Behr, Haswell, Bennett, R. D. Patterson, McCain and Rentschler, all directors of NCR, on the ground that they were necessary, if not indispensable parties. (112 F (2) 881).

4. Affirming order of June 16, 36 striking from final decree entered Apr. 3, 36, that part which ordered defendants Patterson and Steffey to surrender certificates of illegally issued 400,000 B in lieu of 200,000 C or common shares? (see cert. man. denied, 303 U.S. 637, 93 F (2) 1009, Doc. 637).

5. Affirming decision of May 4, 39 and final decree (apx. p. 98) holding that neither 32 reorganization or Deeds' option were fraudulent or were consummated illegally and improperly.

6. Lower courts should have held as a matter of law upon their findings, and/or upon uncontradicted and undisputed facts, which they failed to consider and/or on evidence excluded by court's order, that both transactions were illegal, fraudulent, consummated pursuant to the conspiracy and in violation of their fiduciary duties.

7. Lower courts having erroneously applied or misinter-

preted authorities as supporting their decisions, they erred in entering all orders adverse to plaintiffs and in dismissing bill.

REASONS FOR ALLOWANCE OF WRIT.

1. C.C.A's decision conflicts with decisions of other C.C.A.s and district courts on the same matter, with weight of authority, misinterprets s. 57 and erroneously limits jurisdiction of federal courts strictly to matters in rem.

2. C.C.A.'s decision limiting relief under Eq. r. 27 to transactions occurring after plaintiffs became shareholders conflicts with decision of other C.C.A.s and district courts on the same matter, with Md. decisions, with weight of authority and is in apparent conflict with decisions of Supreme Court.

3. C.C.A.'s decision striking averments respecting illegal issuance of 238,000 A shares, conflicts with decisions of other C.C.A.s and federal and Md. courts, with weight of authority and is in apparent conflict with decisions of this court.

4. C.C.A.'s decision limiting inquiry to matters stated in defendants' bill and forbidding inquiry into matters stricken, conflicts with decisions in other C.C.A.s and federal courts, with weight of authority and is in apparent conflict with decisions of this court.

5. C.C.A.'s decision as to 32 reorganization holding that it was in compliance with Md. laws and NCR's charter, conflicts with Md. decisions and law, decisions in other federal courts, with weight of authority, and deprived A holders of constitutional rights.

6. C.C.A.'s decision that Deeds' option was proper, conflicted with Md. decisions, decisions cited by it, with weight of authority and with decisions of this court.

7. There is no decision by this court which settles or determines the law on the vital and important issues here.

These questions frequently arise and imperative necessity requires that this court shall settle them, more especially as to 1, 2, 3, 5. Reasons and argument are stated in appellants' brief.

PRAYER FOR WRIT

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari to the CCA for the 4th Circuit should be granted.

Respectfully submitted,

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APPLICANTS BRIEF IN SUPPORT OF REASONS FOR GRANTING WRIT.

1. STRIKING AVERMENTS IN PERSONAM CONFLICTS WITH DECISIONS IN OTHER FED. COURTS. MD. COURT HAD JURISDICTION TO DISPOSE OF ALL CONTROVERSIES IN PERSONAM AND IN REM.

Lower courts erred in permitting defendants to appear specially and in holding that they had no jurisdiction under s. 57 to grant relief in personam or alternative relief in rem. In *Bede Co.* v. *N. Y. Co.* 54 F (2) 658, defendants filed special appearance and claimed that court had no jurisdiction to grant relief in personam. It held that appearance did not question jurisdiction, that it was general and that it had jurisdiction to grant relief in all matters in personam and in rem. By declining to follow Bede case, C.C.A.'s decision raised a direct conflict. It also appears to conflict with *McQuillen* v. *DR,* 98 F (2) 726, where C.C.A. (2) held in a suit brought in S.D. of N.Y. to aid in enforcing Md. court's final decree of Apr. 3, 36 to require DR to return certificates for 400,000 B shares or to obtain alternative relief, the lower court having denied relief on the ground the decree sought to be enforced was in personam, that though it sustained lower court's conclusion it did not do so, on the ground stated by lower court, but on the ground that Md. bill upon which the final decree against DR was predicated contained no allegation that DR owned B shares when the suit was brought and therefore had no jurisdiction to entertain the suit or enter this decree. Inferentially, it seems to hold that if bill had contained such allegation that N.Y. Fed. courts would have had jurisdiction to enforce Md. decree. The decision appears to be in direct conflict also with *Harvey* v. *Harvey,* 290 F. 653. It also conflicts with *Ky. Co.* v. *Mineral Co.* 219 F. 45, 46. Also, with

Jellinick v. *Huron Co.* 177 U.S. 1 (leading case) (similar to bill here) where court retained jurisdiction under s. 57 notwithstanding bill alleged grievances in personam. Likewise, it appears to be in conflict with *Hodgman* v. *Atlantic Co.* 274 F. 144, Del. D. C. There court held it had jurisdiction under s. 57 denying motion to dismiss, because bill (like bill here) sought recovery in personam and alternative relief in rem. In same case 300 F. 590 (overruled on other grounds) alternative was granted.

Decision also appears to be in conflict with Coleman J's decision in 13 F.S. 53 and with principles in *Alexander* v. *Hillman* 296 U.S. 222; *Ferguson* v. *Babcock Co.* 252 F. 705; *Franz* v. *Buder* 11 F (2) 854; *Independent Co.* v. *U. S.* 274 U.S. 640, 647; *U. S.* v. *Dunn* 268 U.S. 121; *Root* v. *Woolworth Co.* 150 U.S. 401; *Greeley* v. *Lowe* 155 U.S. 58; *Shield* v. *Thomas* 18 How. 253, 261; *McCandless* v. *Furloud* 296 U.S. 140; *Blackmer* v. *U. S.* 284 U.S. 421, 435; *Hudson* v. *Murray* 231 F. 419; *Holmes* v. *Camp* 219 N.Y. 359; *Ingersoll* v. *Coram* 136 F. 689; *Hillman* v. *U. S.* 296 U.S. 222; *Clark* v. *Boysen* 39 F. (2) 800, 13, 15, 22 (cert. den); *Ferdig Co.* v. *Wilson* 91 F. (2) 857, 60; *Spellman* v. *Sullivan* 43 F. (2) 762; *Thompson* v. *Terminal Shares* 89 F. (2) 652, 5, 7; *Carney* v. *Oil and Gas Co.* 5 F.S. 304; *Dana* v. *Searight* 47 F (2) 38 (cert. den 283 U.S. 856); *Virginia* v. *System* Fed. 300 U.S. 515; *Rogers* v. *Guaranty Co.* 288 U.S. 123; *Rogers* v. *Hill* 289 U.S. 582; *Lamb* v. *Kramer* 285 U.S. 217; *Chandler* v. *Bacon* 30 F. 538; *O. D. Co.* v. *Bigelow* 203 Mass. 159, 218; *Continental Bank* v. *C. R. I.* 294 U.S. 648; *Employers' Co.* v. *Bryant* 299 U.S. 373, 7; *Aetna* v. *Hayworth* 300 U.S. 227, 9, 30.

Md. court also had equity jurisdiction to dispose of all controversies especially those intertwined with or intimately related to matters retained. Defendants' issuance of B was part of conversion of $29,000,000, related to illegal issuances and exchanges of 200,000 C. and 238,000 B and 32

reorganization which were intertwined with Deeds' employment and option. Grievances involved abuses of Fiduciary duty resulting from control through ownership of all B shares which enabled them to use NCR's structure and property wrongfully. Hearing on any one transaction, if evidence was admitted on wide latitude it should have been, involved hearing of all grievances. There is no reason why all of them could not be disposed of together. *Peterson* v. *Hopson* Mass. Ad. Sh. Sept. 17, 40, 1389, 1396 *et seq.*

Suits in personam under s. 51 which must be brought in jurisdiction of defendants' residence, are for their convenience and are not their absolute right. By appearance in Md., to defend any part of bill on the merits, defendants could suffer no inconvenience. If Congress intended to exclude from s. 57 any related in personam matters, it would have so provided, but s. 57 clearly intended that if defendants appeared to defend any part of bill, their appearance was general and that court would have jurisdiction for all purposes. They could have refused to appear whereupon courts would be limited to relief strictly in rem under s. 57, but s. 57 intended and appears to have provided for all relief sought by bill upon any appearance to contest any part of suit. Their powers then broadened, they of necessity had the jurisdiction over parties by their appearances.

Pennoyer v. *Neff,* 95 U.S. 714, erroneously cited by lower courts as an authority has no pertinency. There, suit was brought under s. 51, not s. 57. The non-resident defendant who had the right to be sued where he resided appeared specially to protect property attached in another jurisdiction. No case has been cited or found. Certainly there is no Supreme Court decision which sustains decision below.

Lower courts erroneously relied on *Grable* v. *Killits,* 282 F. 185 (CCA 6). There, though bill in part came under s. 57, defendants were not served on order for substituted

service thereunder, as lower courts here erroneously assumed. Defendants never appeared under s. 57 and did not seek to quash any service thereunder, nor did the court take jurisdiction under s. 57. It issued an order on nonresident defendants to show cause why a receiver should not be appointed over defendants' property outside its jurisdiction. One part of the suit sought liens and cancellation. The other part sought affirmance of same transaction and damages. On the order to show cause, defendants appeared specially to quash service, claiming that court had no jurisdiction to issue or to bring them in under such order. C.C.A. overruled lower court's decision, granting motion to quash. Grable case did not hold that where nonresidents appeared specially upon substituted service under s. 57 that they could have stricken matters in personam. The Bede and Harvey cases were decided after Grable case. Neither case even mentioned it. The Ky. Co. case was decided by same court. It does not mention either Jellinick or the Ky. Co. cases. It is deducible from Grable case that courts would not have sanctioned special appearances under s. 57, or stricken from bill any averments, a fortiori where they related to parts retained. They did not strike in personam averments.

The Grable case is authority for plaintiffs. The decision there is in conflict with decisions here. *Irwin* v. *Quintanelta,* 99 F (2) 935; *Woodside* v. *U. S.* (CCA 4) 60 F (2) 823.

Moreover, defendants were fiduciaries, holding as res the misappropriated funds, title to which was in NCR. This res was located as much in Md. as anywhere and thereby vested jurisdiction in Md. Ct. *Spellman* v. *Sullivan,* 43 F (2) 762, *Dahlgren* v. *Pierce,* 263 F. 841; *Franz* v. *Buder,* 11 F (2) 854, 8.

2. LIMITING RELIEF UNDER EQ. R. 27 TO TRANSACTIONS WHICH OCCURRED AFTER PLAINTIFFS BECAME SHAREHOLDERS CONFLICTS WITH OTHER MD. STATE AND ENGLISH DECISIONS IS OPPOSED TO WEIGHT OF AUTHORITY AND APPARENTLY TO DECISIONS OF THIS COURT.

C.C.A. stated that there were conflicts between its decision and decisions of some state and English courts (112 F (2) 882). It cited as leading cases opposed to its view, *Pollitz* v. *Gould* 202 N.Y. 11; *Seton* v. *Grant* L.R. (1867) 2 Ch. App. 459). Other English cases opposed to C.C.A. decision are *Bloxas* v. *Met Co.* L.R. 3 Cr. App. (1868) 353; *Potter* v. *M. Co.* L.R. 38 Cha. App. Div. 92, 96; *Nat. Bk. In re:* L.R. Ch. Div. 2 (1899) 629; *Forrest* v. *M & S Co.* 45 Eng. Rep. 1131, 1173; *Filder* v. *London,* L.L. B. & So. 61 Eng. Rep. 214, 216. C.C.A. decisions conflicts with *Hand* v. *Kan. Co.* 55 F (2) 712, 714, which held that plaintiff need not be shareholder when suit was brought, citing *Ball* v. *Rutland* 93 F. 513; *Lindsley* v. *Natural Co.* (N.Y.) 162 F. 954; *Kelly* v. *Dolan* 218 F. 966; *Ogden* v. *Gilt Co.* 225 F. 723, which held that R. 27 is not jurisdictional and that requirements for certain preliminary steps by stockholders before suing will be dispensed with where interests of directors are antagonistic.

In *Jacobson* v. *G. M. Co.* 22 F.S. 255, Judge Knox reached a decision contrary to the Hand case, citing as supporting his conclusion, *Venner* v. *G. N. Co.* 153 F. 408, and *Hitchings* v. *Cobalt Co.* 189 F. 241. The Hitchings case was removed from state to the federal court and was decided prior to Pollitz case. Judge Knox did not follow the Hitchings in the Hand case, nor did he follow the Hand case in the Jacobson case, though one of the actions in the Jacobson case was removed by defendants from state to the federal court. The Hitchings case conflicts with Pollitz case and also with *Jabor* v. *Agnew* S.D.N.Y. Jan. 5, 40, which held that where case was removed from State to federal court in N.Y. plain-

tiffs could complain of grievances prior to his becoming shareholder, citing Lindsley and Hand cases. In the Jacobson case, Judge Knox held that there should be one authoritative decision by this court which would clear up the distinctions and conflicts arising under some decisions and R. 27, now C.P.R. 23.

C.C.A. referred to *Krous* v. *Brevard Co.* CCA (4) 1918, 249 F. 538, 543, not in support of its decision for it appears to be in conflict with it. It held that while the underlying thought for the basis of R. 27 was well understood, its application was dependent upon facts in each case, was given practical operation and such play as fits the condition of different cases, citing *D & H Co.* v. *A & S Co.* 213 U.S. 435.

C.C.A. here cited not as authorities in support of its conclusion, *Dimpfell* v. *Ohio,* 110 U.S. 209; *Corbus* v. *Alaska Co.* 187 U.S. 455; *Venner* v. *Great Co.* 209 U.S. 24; *Quincy* v. *Steele,* 120 U.S. 467. They do not even remotely support its conclusion. Other courts have erroneously referred to these cases as if supporting the proposition that plaintiffs must have been shareholders when grievances complained of were committed. These cases not only do not support such conclusion but the reasoning in them and in many other C.C.A. and district court cases are opposed to such conclusion and demonstrate that the single purpose of R. 27 as explained in *Hawes* v. *Oakland* 104 U.S. 450 and in these cases was exclusively to prevent collusive suits being brought in federal courts and not to change substantive rule. *Am. Works* v. *Powell,* 298 F. 417, 420; *D & H Co.* v. *A & S Co.,* 213 U.S. 435; *Doctor* v. *Harrington,* 196 U.S. 579; *Price* v. *Union Co.,* 187 F. 866. In the Venner case the only question decided was a jurisdictional one, as to whether there was the requisite diversity of citizenship.

It is apparent that the decisions in this court appeared to have raised conflicts, that they have been misinterpreted and misunderstood by some of the lower courts and by the

C.C.A. (4); that there are conflicts between decisions of lower federal courts and the state and English decisions. This should be cleared up by an authorative decision by this court which shall settle any conflicts. The same conflicts have arisen under C.P.R. 23.

C.C.A. erroneously stated that the Md. doctrine, citing *Matthews* v. *Headley Co.* 113 Md. 523, 532, 534, 100 A 645, was in line with its conclusions. There, suit was brought by a corporation to recover excessive salaries. The management acquired control from defendants. It held that recovery would enable them to receive back, through the corporation, more than the stock cost them; that they were bound by defendants' acts, that they received what was represented and what they bought and that suing through the corporation was a guise to obtain improper advantages. This was the sole basis for that decision. It held that nonconsenting minority might recover the excesses in their own interests.

Dictum reference was made to R. 27 which by no means held as C.C.A. stated. It did not decide that no recovery could be had by stockholders because they did not own shares at time of grievances. *Eshleman* v. *Keenan,* 187 A. 25, 27 (1936), 2 A. (2) 904, discussing *Matthews* case, held that it was peculiar and that its decision was limited as above stated. Md. Law Rev. 1940, Vol. 4, 380, 391, discusses the question as to whether stockholders are prevented in Md. from suing for wrongs committed by directors before they became shareholders. It showed convincingly by many authorities that under Md. law, following the best and most popular view, that they were not prevented and that Matthews case did not hold that they were prevented. It demonstrated that the prevailing rule in England and 13 other states where question arose was that stockholders could sue for prior wrongs committed.

In *Peterson* v. *Hopson,* decided by Mass. Sup. Ct. Ad. Sh.

Sept. 14, 40 1389, held that plaintiffs need not be shareholders when grievances occurred and that the weight of authority entitles them to complain of all directors' and officers' wrongdoings, their misappropriations being corporate property in which all shareholders are interested, citing *Pollitz* case, *Seasongood,* 21 Harv. L.R. 195, Cook Corp. Ed. 8, 23, s. 736, 737, Fletcher Cyc. Corp. Rev. Ed. 32, s. 5980, 5981; Scott Trusts, s. 297 (a) 282.4, 294.2-295.1; *Greer Co.* v. *Booth,* 62 F (2) 321.

3. C.C.A. DECISION AFFIRMING ORDER STRIKING AVERMENTS AS TO ISSUANCE OF 238,000 A SHARES CONFLICTS WITH DECISION OF THIS COURT OR WITH OTHER C.C.A.s, IS OPPOSED TO WEIGHT OF AUTHORITY AND IS NOT SUPPORTED BY AUTHORITIES CITED.

Examination of cases cited by Md. Ct. (apx. 90) do not sustain its conclusion. On the contrary, they are either opposed or have no bearing. Lower courts' decision seem to be in conflict. *American Co.* v. *Drawmakers,* 90 F. 598; *Carson* v. *Alleghany Co.* 189 F. 791, 804; *Hawes* v. *Oakland,* 104 U.S. 461; *Doane* v. *Consolidated Corp.* 271 F. 12, *Christopher* v. *Brusselback,* 302 U.S. 500; *Widenfelt* v. *N. P. Ry.* 129 F. 305, 310. *Greer Co.* v. *Booth: Peterson* v. *Hopson. Magruder* v. *Drury,* 235 U.S. 106.

The decision conflicts with *Keller* v. *Wilson, Yoakum* v. *Biltmore Co.,* 34 F (2) 533; *Barkley* v. *Wabash Co.* 30 F (2) 260, 264, 5, 7; *Greenwood* v. *Freight Co.* 105 U.S. 13, 15; *Commerce Co.* v. *Chandler,* 295 F. 241, 243; *Coombes* v. *Goetz,* 285 U.S. 434; *Berslav* v. *N. Y. Q. Co.* 249 A.D. 181; *Looker* v. *Maynard,* 179 U.S. 46, 51; *Miller* v. *State,* 15 Wall. 478, 491. Particularly is it in conflict with *Alleghany Corp.* v. *Aldebrand Corp. and Tri-Contintental Corp.,* C.C. 2 of Balt. Md. (1937) Doc. Nos. 85, 86 which sought relief similar to that sought here, where plaintiffs sued for corporation in behalf of themselves and all other stockholders.

Keller v. *Wilson,* 180 A. 584, app. 190 A. 115 is directly in conflict with decision here. The Del. Ct. denied a similar motion to dismiss a suit brought by a minority stockholder in behalf of himself and other shareholders, holding that the other shareholders affected were not indispensable parties and the plaintiff could establish rights for other shareholders similarly situated. The decision is in conflict with Coleman, J.'s decision in 13 F.S. 53, *Southern Co.* v. *Bogert,* 250 U.S. 483; *Harvey, Jellinick, Rogers* v. *Hill and Rogers* v. *Guaranty Co.* and a host of other decisions involving the same issues where the bill was brought by one shareholder for the benefit of all others and the corporation. Action taken here was as part of 32 reorganization. Thereby, NCR, by acts of defendants, created, without consideration, 238,000 new A shares and 200,000 C shares which increased the burdens of N.C.R. They were void shares, coerced upon NCR by illegal and fraudulent action of defendants. They never had any legal existence and this suit was brought to clear title to properly issued shares by removal of the illegal burdens. It purported to be accomplished by necessary statutory action. (Art. 23, s. 28, 29, 30, 31.) Only 58% of A purported to adopt the illegal resolution and the illegal changes. Minority B shares held by defendants (and this was concealed) coerced NCR to issue such illegal shares and coerced A holders to accept them. It was necessary as part of the relief to cancel the entire 32 reorganization and not a part of it, *i.e.* cancellation of the 200,000 C, and the 238,000 A in lieu of accumulated and all preferred dividends. It changed status of A holders from preferred to common. No new shares could be issued without action and vote of a required number of shares, whether it was a 2/3rds vote or a unanimous vote, but clearly such issuance could not divest A shareholders of at least their vested rights without the consent of all. Issuance of additional shares suspended possibility and size of dividends. The ruling defies com

mon sense, and all rules by which shareholders may establish their rights as against illegal action affecting their rights in the corporate entity. The joining of 19,000 holders of 1,190,000 A shares is as ludicrous as it is impossible and makes a travesty of justice.

4. LIMITING EVIDENCE TO TRANSACTIONS RETAINED AND FORBIDDING INQUIRY INTO MATTERS STRICKEN CONFLICTS WITH APPLICABLE DECISIONS IN ALL FEDERAL COURTS AND WITH WEIGHT OF AUTHORITY.

112 F (2) 883 C.C.A. stated that in the light of other rulings by Md. Ct. the ruling limiting the evidence as stated above was a proper exercise of Coleman, J.'s discretion. His Nov. 10, 38 order was not based upon discretion nor was any discretion permissible and if it was it was abused. C.C.A. also stated that by virtue of previous rulings, if Coleman, J. erred, no substantial harm resulted. To hold that in declining to consider evidence of other gross frauds committed by defendant officers and directors, among them converting $29,000,000 of NCR's funds and 400,000 B shares valued at $33.50 per share, and not considering the evidence based upon other similar wrongs committed by them, *i.e.* illegal or excessive salaries, as showing that they used their control for purposes of their own and in consummating the transactions complained of, is disregard of a host of federal and state cases which conflict with this conclusion, among them *Tilden* v. *Barbour,* 268 F. 587, 9, 606, 7, 8; *Irving Co.* v. *Deutsch,* 73 F (2) 121, 3; *Jackson* v. *Ludelling,* 21 Wall. 616; *Jackson* v. *Smith,* 254 U.S. 586, 8, 9; *Butler* v. *Watkins,* 13 Wall, 456, 464; *Big Spring Co.* v. *Kitzmiller,* 268 Pa. 34, 38; *Commonwealth* v. *Reading,* 204 Pa. 151; *Bailey* v. *Jacobs,* 325 Pa. 187; *N. E. Co.* v. *Reed,* 209 Mass. 556, 562; *Att. Gen.* v. *Pelletier,* 240 Mass. 265, 316; *Lantin* v. *Goodnow,* 207 Mass. 291; *Backus* v. *Finkelstein,* 23 F (2) 357; *Loft* v. *Guth,* 5 A. (2) 503; *Pollitz* v.

Wabash, 207 N.Y. 113; *U. S.* v. *Kissell,* 218 U.S. 601, 606; (2) 705; *Sutton* v. *Sutton,* 56 Md. 109. *Peterson* v. *Hopson, supra.*

5. C.C.A.'s DECISION HOLDING 32 REORGANIZATION COMPLIED WITH MD. LAWS AND NCR's CHARTER CONFLICTED WITH MD., FEDERAL AND STATE COURT DECISIONS AND WITH WEIGHT OF AUTHORITY AND DEPRIVED PLAINTIFFS OF CONSTITUTIONAL RIGHTS.

C.C.A. held that Md. Ct.'s rulings respecting changes made by 32 reorganization was correct under Md. law, under NCR's charter and under corporation laws of Md. It also ruled that the secretary of NCR in reporting to Md. Tax Commissioner that the Articles of Reduction of its capital stock, amendment authorizing issuance of 200,000 C shares, having same rights as A shares and right to exchange same for B shares, both acknowledged by defendant, Allyn, and sworn to and filed by defendant Kuhns, Dec. 20, 32 (ex. 4, 5, apx. 334, 344) and the amendment authorizing issuance of 238,000 A as so-called split-up stock to be issued to A holders in lieu of their accumulated and future preferred dividends, acknowledged by Allyn, and sworn to by Kuhns, Dec. 23 and filed with Tax Commissioner Dec. 27, 32, and stock issuance statement acknowledged by Allyn and sworn to by Kuhns Dec. 23, 32 and filed with Commissioner Dec. 28, 32 (ex. 7, 8, apx. 348–355) inc) falsely swearing that these documents had been authorized, in accordance with notice to stockholders, by 2/3rds of each class of A and B, when the changes had only been authorized by 2/3rds of the outstanding shares included as a single class, was unfortunate, immaterial error, and that the statement as to the reduction of the capital stock had no bearing upon the actual value of its share or the corporate assets.

The decision of both courts conflicts with *Chesapeake Corp.* v. *Tri-Continental Co.,* Derns, C. J., C.C. 2, Balti-

more, Common Pleas, Aug. 2, 37, where court held that the changes in the terms of cumulative preferred 5½ stock depriving them of accumulations and other rights were repugnant to rights secured by Md. law, contract and under Art. 23, s. 28, which has application here.

Coleman, J. stated in 27 F.S. @ 645 that Md. courts have never decided or considered this question-overlooking above case and that it has never been decided by federal courts, although it had been considered in N.Y., N.J. and Del. favorably to dissenting holders. He erroneously held that Md. statutes were broader than those in these states and are therefore not controlling, citing cases. Clearly C.C.A. and Md. courts' decision conflicts with *Keller* v. *Wilson*, 180 A. 584, affirmed, 190 A. 115; *Bank* v. *Veigh*, 61 Va. 457; *Breslav* v. *N.Y.Q. Co.*, 249 A.D. (N.Y.) 181; *Whicker* v. *Del. Corp.* 15 Pac. (2) 160; *Miller* v. *State*, 15 Wall. 478, 486, 493; *Yoakum* v. *Biltmore Co.* 34 F (2) 533; *Londsale Co.* v. *International Co.* 101 N.J. Eq. 554; *Dow* v. *North*, 67 N.H. (1) 17, 18; Opinion of Justices, 66 N.H. 629, 633; *Dartmouth College* case, *Ashton* v. *Burbank*, Fed. cases #582; *Davis* v. *Louisville Co.* 142 A. 564 (Del); *Coombs* v. *Goetz*, 285 U.S. 434; *Locker* v. *Maynard*, 179 U.S. 46. *Greer Co.* v. *Booth, supra.*

Lower courts erred in holding that federal courts have never decided this question. Yoakum case squarely decides it. He erroneously states Md. statute, takes case out of conflicting decisions. It does not. Md. laws, Art. 23, s. 23 and Art. 7 of NCR's charter do not authorize these violent changes of A holders' rights, a fortiori, in favor of B holders who manipulated the transaction and failed to disclose their interest and committed other wrongs which they concealed. They had no such depredating purpose and cannot be construed in any event to take vested, contractual, statutory and constitutional rights from them, a fortiori in their own favor. Charter of NCR (apx. 313) states

rights of A holders and rights to make changes. (Arts. 6, 7.) It does not authorize changes in the "terms" of any issued and outstanding shares, nor does it authorize any stripping or conversion of rights of A holders, a fortiori to give value to valueless B. That could no more be done under the charter than A could by their votes (and they held more than 2/3rds) take away rights of B to control NCR with all its benefits. Each article must be construed like any other contract, as part of an entirety, in its relation to whole.

Art. 7, nor s. 23 cannot be interpreted to authorize the issuance of the 238,000 A shares in lieu of accumulated and future dividends, payable in cash, nor authorize creation of C shares to be exchanged for B shares and grafted on to rights of A holders, compelling A, who contributed all NCR's capital to share dividends which were guaranteed to them with B holders giving them 1/8th of earnings. Cases are numberless to the effect that state powers reserved to change, alter or amend corporation's charter can not take away from stockholders vested property rights. It may as well be asserted that B holders could, without A's consent, take private property whenever they chose to do so.

Art. 6 of charter provided that A shall be entitled, in preference to B, to dividends at $3, payable quarterly; that whether earned, not earned or declared, they shall be cumulative and when not paid or declared, the deficiency shall be paid before dividends are paid to B; that subject to this preference, non-cumulative dividends of $3, when declared, shall be paid to B before any dividends are paid on A stock, in addition to A cumulative preferential dividends; that A and B, as if holders of one class, shall share additional dividends.

Undoubtedly, as a matter of right and contractually, cumulative dividends gave the A vested, constitutional

rights which B nor any one else could deprive them of. Art. 7 was necessarily subject to and not in derogation of Art. 6.

The same situation arose in cases cited, especially the Keller and Yoakum cases, both of which have been cited with approval and the Keller case has been reaffirmed.

Art. 7 must be construed as intending to benefit NCR, not as changing inter sesse rights of shareholders. NCR could issue additional A shares for consideration or for exchange of shares of another class which took none of their rights and did not change any of the "terms" of their contract as provided in Art. 23, s. 28. If the "terms" were changed as they were here, then s. 28 required the consent of all shareholders, a fortiori where cumulative dividends accrued. S. 28 permitted charter provisions which could make change of terms by 2/3rd vote of each class of stock. There was no such provisions here. Therefore, unanimous consent was necessary to affect the change in the terms of A shares or to illegally increase the number of A shares. It is needless to discuss whether 2/3rds of A could vote to waive accrued dividends. Cases hold this could not be done. Yoakum, Keller and Chesapeake cases so hold. Certainly it could not be done by vote or action of those who secretly and in violation of their fiduciary duties profited thereby. It is of no consequence whether B gave up rights or not. Their shares were valueless, their control would have been lost but for their manipulations, their lucrative positions were menaced, and their liability for wrongs committed was threatened. To hold, as the lower courts did, that they surrendered anything of value, in view of their depredations (apx. 55) is to claim that they were saints, instead of depredating trustees.

6. CCA'S DECISION THAT DEEDS' OPTION WAS PROPER CONFLICTED WITH MD. DECISION, DECISIONS CITED BY IT, WITH WEIGHT OF AUTHORITY AND WITH AUTHORITY AND WITH DECISIONS OF THIS COURT.

In support of its conclusion, C.C.A. relies on *Wight* v. *Heublein,* 238 F. 321 (CCA 4). Md. Ct. cited *Rogers* v. *Hill,* 289 U.S. 582, *Kopler* v. *Warner Co.* 19 F.S. 173; *Matthews* v. *Headley, supra; Seitz* v. *Union Co.* 152 Minn. 533; *Ransome Co.* v. *Moody* 282 F. 29; *Presidio Co.* v. *Overton* 261 F. 933; *Francis* v. *Brigham Co.* 108 Md. 233. None of them support conclusions of either court. The facts in them are radically different from those facts here. Rather than supporting their conclusions they are opposed to them. In the *Wight* case, there was a decree for plaintiff shareholders, not for the defendant officers. Notwithstanding that earnings were very high for a long period, for 3 yrs. earnings were low and no dividends were paid. Salaries were $15,000, $7500, and $4200, which were substantially reduced. Both courts held that salaries were excessive, disproportionate to services rendered, and unjust to minority. The court relied on 3 Clark & Marshall Corps. 2062 and *Wickersham* v. *Crittenden,* 93 Cal. 17, which held that directors could not vote *excessive* compensation to themselves or others and that equity will enjoin such acts or compel accountings. The latter case held that since directors were fiduciaries, entrusted with the management, that by their acceptance of office they precluded themselves from doing any acts or engaging in any transaction in which their private interests conflicted with their duties to stockholders and from using their power or corporate property for their advantage. This case is in direct conflict. In *Sietz* case, salaries and bonus received were small and were based on earnings, after making provision for invested capital. Officers gave their entire time to the business, paid dividends as high as 16%

and put by substantial surpluses. In *Kopler* case, suit had previously been brought in other courts to recover excessive salaries and stock issued, which had been settled, defendants returning substantial consideration to their corporation. Other stockholders sued to establish liability against them for same wrongs. The court held that stockholders were bound by the settlement. In the *Headley* case, corporation sued, not minority shareholders. The court did not hold there, that salaries paid to defendant management were not excessive or recoverable. It held that corporation, managed by persons who had acquired their stock from defendants, could not recover. It held also that minority stockholders might recover, proportionate to their stock holdings, the excesses paid defendants. In the *Ransome* case, corporation sued to set aside an employment contract. Defendants counter-claimed for breach. P. 34, Hough, J., held in effect that the suit was not brought by minority shareholders but was brought by corporation, that minority holders were not estopped from suing, as they did not consent to the arrangement, that the corporation, more particularly since majority stockholders which controlled it and made contract, is estopped. It strongly indicated that if minority sued they could recover. The *Presidio* case is very long. The salaries were meagre, about $200 to $400 per month and earnings were substantial. Not one of the cases is even remotely pertinent here.

Conclusions of lower courts conflict with *National Co.* v. *Hogland,* 101 F. (2) 576; *Dupont* v. *Dupont,* 242 F. 98; 256 F. 129; *Loft* v. *Guth,* 5 A (2) 503, 10, 11, 14, 15; *Wooton* v. *Ownbay,* 265 F. 91, 99; *Amer. Works* v. *Powell,* 298 F. 417, 422, 423; *Godley* v. *Crandall* 212 N.Y. 129; Perry on Trusts (ed. 7, vol. 1) par. 427, p. 710; par. 429, p. 714; par. 430, p. 717; par. 431, p. 717; par. 432, p. 719; par. 433, p. 721; *Pollitz* v. *Wabash* 207 N.Y. 113, 124; *Chamberlain* v. *Chamberlain,* 209 F (2) 357; *Irving Co.* v. *Deutsch* 73 F (2) 121,

3, 4; *Beatty* v. *Guggenheim* 225 N.Y. 380; *Brounschwig* v. *Carthage Co.* 334 Mo. 319.

It conflicts with Md. cases. *Peninsular Co.* v. *Johnson,* 128 Md. 535; *Fisher* v. *Barr* 92 Md. 245; *Md. Ct.* v. *Mechanics Bank* 102 Md. 617; *Burke* v. *Smith* 11 Md. 616; Brune Md. Corp. Law, p. 74, s. 61.

It conflicts with cases in other states. *Provident Co.* v. *Geyer,* 248 Pa. 423, 430; *Glenn* v. *Kittanning* 103 A. 340; *Little* v. *Phillips* 208 Mass. 331; *Stratus* v. *Anderson* 254 Mass. 536; *Sagalyn* v. *Meekins,* 290 Mass. 434. It conflicts with decisions of this court, *Rogers* v. *Hill,* 289 U.S. 582; *Rogers* v. *Guaranty Co.* (Dis. Op.) 288 U.S. 123, 133. See *Bogardus* v. *Commissioner,* decided by this court Nov. 8, 37; *Northern Co.* v. *Southern Co.* 73 F (2) 333, 335.

The lower court failed to consider NCR's earnings and A dividend requirements. Between 26 and 29 inc. annual earnings ran between $6,786,000 and $8,339,000. In 30 earnings were $3,544,000; 31, a deficit of $1,179,000; 32, the loss was $4,499,000, wiping out surplus of 31 of $1,022,000, impairing capital $3,472,910; 33 loss was $1,131,396, increasing impairment to $4,604,806. Unpaid dividends for 31 and 32 were $6,693,732, and for 33 increased to $11,298,038. In 34 about $14,868,000. The profits between 34 and 38 were $739,371; $1,020,409; $1,959,000; $1,211,507 deducting undistributed foreign profits unavailable for dividends.

It is too obvious to require discussion that if the option was a bonus from which Deeds obtained a profit of $30 per share on the 60,000 shares he acquired, in addition to $100,000 annual salary that he was not only being excessively paid but he also was eating into the corporate capital in chunks. If there were any earnings they were available first to A shareholders. NCR, not Deeds, was entitled to profits on investments made by it. Dividends and earnings were so meagre compared to his salary and bonus as to give no warrant whatsoever for any such compensation. If, on the

other hand, there was no relation whatsoever between the option and the services which he rendered, then clearly, under *Rogers* v. *Hill* and the authorities above cited, what he received was a gratuity, the use of NCR's funds in speculative enterprise, wholly and unwarrantably for his benefit, which did not enrich it, and while he was a fiduciary. He was forbidden by Md. law, s. 87, *Hagerstown Co.* v. *Baker*, 155 Md. 549, *Natl. Co.* v. *Hogland* 101 F (2) 576, to borrow or use its funds or to make use of its assets and structure in his own interest. The option contract of Sept. 16, 32 (apx. 307) made 1½ years after he became chairman and a director, within a few days of the consummation of the 32 reorganization, consideration of which began in 31 after he was elected, does not recite the salary he received. It recited that he be given right to *purchase* A shares in amounts and on terms to be agreed upon between him and the corporation. The option was not a purchase agreement. It his no relation whatsoever to the value of his services (*Rogers* v. *Hill*), and is unconnected with any services which he has rendered or is to render. It is clearly a void contract never at any time known to or ratified by stockholders. It is unnecessary to discuss here the wrongful acts in which he was the chief participant as chairman of the corporation which would deprive him of any salary or option. During his incumbency, in 36, the liabilities increased from $3,650,270 to $7,286,992, by the borrowing of $3,250,000. Earnings per share during his incumbency were nothing in 31, deficit of $2.09 in 32, deficit of $.36 in 33, $.89 in 34, $.93 in 35, $1.76 in 36, $2.41 in 37, $1.30 in 38. No dividends were paid in 31, 32 and 33. $.37½ was paid in 34, $.50 in 35, $1.00 in 36 and $1.25 in 37. In 8 years A holders received $.12½ dividends. By the capital reduction scheme they received over this period $4,562,361 under the guise of dividends when it was in fact their own capital. Part of this capital was paid in dividends to B. During first 5 years of NCR's opera-

tions when Deeds was not connected with NCR its profits were $34,000,000, annual average of $5,666,000. 31 to 33, loss was $6,990,992. Profit 34 to 35 was $1,959,780. Profits unavailable for dividends 34 to 38, incl., were $6,803,953, less than 2 years A requirements—less by nearly $4,000,000 5 years A requirements and with foreign undistributed profits added, it was $11,137,000, less by $6,000,000, 4 years A requirements. Deducting loss 31 to 33, incl., $6,990,992 from profits 34 to 38, incl., without undistributed foreign profits, NCR between 31 and 38 showed loss of $106,039; including undistributed profits, profits 31 to 38, incl., were $4,228,135 total, only $700,000 more than one year's A requirements. (Ann. rep. 30 to 38 Apx.)

The conclusions reached by lower court were based upon facts and circumstances which were not only erroneous but in conflict with all authorities.

Use by deeds with consent of other directors for NCR's funds to make profit for themselves violated their fiduciary duties. *Greer Co.* v. *Booth, Peterson* v. *Hopson, supra.*

7. THERE IS NO DECISION BY THIS COURT WHICH SETTLES OR DETERMINES THE LAW ON THE VITAL AND IMPORTANT ISSUES HERE, MORE ESPECIALLY AS TO POINTS 1, 2, 3, 5.

Wherefore, applicants pray that their petition shall be granted.

Respectfully submitted,

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